IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 74

SOUTHERN RAILWAY COMPANY, *Appellant*,

v.

NORTH CAROLINA, ET AL., *Appellees*.

No. 93

UNITED STATES, ET AL., *Appellants*,

v.

NORTH CAROLINA, ET AL., *Appellees*.

On Appeals from the United States District Court for the Middle District of North Carolina

MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE A BRIEF ON THE MERITS AS AMICUS CURIAE AND ANNEXED BRIEF

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MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE A BRIEF ON THE MERITS AS AMICUS CURIAE, AND ANNEXED BRIEF

The Railway Labor Executives' Association hereby respectfully moves the Court for leave to file the annexed brief *amicus curiae* in opposition to the appeals of the United States of America, et al., from the final order and judgment of the District Court reversing an order of

the Interstate Commerce Commission. The consent of the attorneys for all parties in No. 93 has been obtained; the consent of the attorney for the appellant in No. 74 was requested but refused.[1]

I.

The Railway Labor Executives' Association is a voluntary unincorporated Association located in Washington, D. C., with which are affiliated twenty-three standard national and international railroad labor organizations that are the duly authorized representatives under the Railway Labor Act of the bulk of the nation's rail employees, including the employees of appellant Southern Railway Company. The names of these individual organizations are:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railroad Trainmen
Brotherhood Railway Carmen of America
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Sleeping Car Porters
Hotel and Restaurant Employees and Bartenders International Union
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Organization Masters, Mates & Pilots of America

[1] The two appeals have been consolidated for argument. The Rules of the Court are not clear whether a motion for leave to file the annexed brief on the merits need be submitted under these circumstances.

National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers' International Association
Switchmen's Union of North America
The Order of Railroad Telegraphers

The Supreme Court of the United States has recognized the Association as the proper party to appear and speak for these affiliated organizations and the member-employees. *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142 (1950); *American Trucking Associations, Inc., et al.* v. *United States*, 355 U.S. 141 (1957).

II.

The Association and the individual railroad organizations of which it is composed and the railroad employees they represent have a substantial interest in the issues presented by these appeals. These cases placed before the Court questions of initial impression involving recent amendments to the Interstate Commerce Act granting the Interstate Commerce Commission limited appellate jurisdiction over the decisions of state regulatory bodies denying applications for the discontinuances of trains operating within the boundaries of a single state.

The Association appeared in the proceeding before the Commission in opposition to the proposed discontinuances and advised the Commission that the same, if carried out, would result in adverse effect to certain employees of the carrier. The same adverse effect is present in any proposed train discontinuance. Thus the Association, the individual organizations of which it is composed and the employees represented by these organizations have a substantial interest in these appeals bringing into issue the

standards of administrative judgment which the Act requires the Commission to observe in reversing the judgments of state regulatory bodies and permitting discontinuances of "intrastate" train service.

III.

The appellees in these cases are not in the same position as is the Association to speak for the whole of railroad labor with respect to the important questions of statutory construction before the Court on these appeals.

Wherefore, the Association moves the Court for leave to file the brief annexed hereto on the merits of the questions presented.

Respectfully submitted,

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the State of North Carolina, et al., appellees in the consolidated cases, and in opposition to the prayer of appellants for reversal of the final judgment of the United States District Court for the Middle District of North Carolina setting aside an order of the Interstate Commerce Commission (I.C.C.) for failure to consider substantial evidence of record, make adequate findings with respect thereto, and correctly apply

statutory standards as set forth in Section 13a(2) of the Interstate Commerce Act, 49 U.S.C. 13a(2), in determining that the public convenience and necessity permitted the discontinuance of the local passenger trains involved, and that their continued operation would constitute an unjust and undue burden upon the interstate operations of the Southern Railway Company.

INTEREST OF THE ASSOCIATION

The interest of the Association is set forth in the annexed motion for leave to file this brief.

ARGUMENT

Statutory Standards Under Section 13a(2).

The instant cases present issues of initial impression concerning the limited additional authority granted the I.C.C. and the standards to be observed in its appellate jurisdiction under Section 13a(2) over state regulatory bodies with respect to the need for continuance of trains operated wholly within the boundaries of a single state.

Enactment of the Transportation Act of 1958, 72 Stat. 568, added Section 13a to the Interstate Commerce Act (Act) and provided markedly different standards of procedure to be observed when discontinuance of an intrastate train (operated wholly within one state) vis-a-vis an interstate train (multi-state operations) is sought to be accomplished. *New Jersey* v. *New York, S. & W. R. Co.*, 372 U.S. 1 (1963). As this Court noted in that case, the legislative history of these extensions of I.C.C. authority furnishes assistance in determining the procedures and standards that must be observed by the Commission in its administrative handling of proceedings thereunder.

Perusal of the legislative debates clearly discloses the concern evidenced by the Congress in its consideration of S. 3778, 85th Cong., 2d Sess., wherein as originally drawn it provided for identical procedures and standards to be

followed by the railroads and the I.C.C. in the discontinuance of both "intrastate" and "interstate" trains. Upon the urging of Senator Russell, the Senate removed from the bill all authority given therein to the Commission to pass upon "intrastate" train discontinuances, thus avoiding what the Senator described as "a direct and drastic blow to the authority of state regulatory bodies," and "an assault on our dual form of government" (104 Cong. Rec., 10850). The companion bill in the House, H.R. 12832, 85th Cong., 2d Sess., specifically excluded from I.C.C. jurisdiction trains operating wholly within a single state and accordingly generated no similar problem.

Both bills in their initial provisions, while providing for testing the merits of all such proposals against public convenience and necessity and undue burden on interstate commerce, included a provision barring the Commission from denying any proposal if it found that operation of the train sought to be discontinued would result in a "net loss" to the carrier involved. It is shown that Senator Javits and others were of the view that the "net loss" provision in and of itself would become the sole criterion upon which all discontinuances would be decided, and the I.C.C. would be powerless to prevent discontinuances of any train if it were shown that its operation—alone—caused a "net loss" (104 Cong. Rec. 10838-9).

Opposition to the "net loss" provision was also based upon the failure of Congress to clearly set forth how such a result was to be calculated, whether other operations of the carrier were to be considered along with those of the particular train in the determination of the loss, and against what base or financial standard the impact of the "net loss" was to be measured. In the words of Senator Javits (quite prophetically):

> Why do I say that the bill tries to move too far too fast? It is because the question of what constitutes net loss will have to be determined by some one somewhere as a matter of law. It is my view, as the bill is now

> written, that question of law will be decided in terms of net loss on the particular section of a railroad which is sought to be discontinued, rather than the net loss on the total operations of the carrier of which that section of the railroad is a part.
>
> . . . . . .
>
> As the bill is written, if a loss is shown on a particular section of a railroad, that railroad can discontinue that section of the railroad, and the Interstate Commerce Commission cannot stop it. (104 Cong. Rec. 10846-8)[2]

In conference the bill was modified to extend to the Commission limited authority with respect to "intrastate" train discontinuances differing substantially from the procedure and standards retained for interstate train discontinuances, and the objectionable "net loss" provision was deleted. The substance of these changes is best explained by the comments of Senators Smathers, Bricker and Javits in discussing the conference report in the Senate.

Senator Smathers:

> With respect to the discontinuance of service, we have given to the Interstate Commerce Commission for the first time the right to discontinue service when the service crosses a State line. However, we protected the right of the States, so ably explained by the distinguished Senator from Georgia and those others concerned about States' rights, by leaving to the State regulatory agencies the right to regulate and have a final decision with respect to the discontinuance of train service which originated and ended within one particular State, except when it could be established that intrastate service was a burden on interstate commerce. (104 Cong. Rec. 15528).

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[2] Senator Javits quite pointedly added ": . . almost Hornbook law that a public utility is the concern of everyone, and that the only time a public utility can be allowed to discontinue a branch of service upon which it is suffering a loss is if the operation seriously prejudices the whole financial picture of the utility." (104 Cong. Rec. 10848.)

At a later point and with a similar purpose in mind Senator Bricker, one of the conferees, commented:

> There was one provision which was debated on the floor particularly, and which I discussed with the distinguished Senator from New York [Mr. Javits]. This provision dealt with the problem of net loss and the abandonment of service. That matter was of peculiar interest to the distinguished Senator from Connecticut [Mr. Purtell]. Although we differed on the interpretation of the section of the bill covering that subject, nevertheless, I assure the Senator from New York that the bill as it came from the conference puts the question of abondonment of service in practically the same situation, so far as original jurisdiction and appellate jurisdiction are concerned, *as were the provisions under Section 13 of the old interstate-commerce law.* (Emphasis supplied.)
>
> So there is a primary jurisdiction existing within the States, and an appellate jurisdiction in the Interstate Commerce Commission, as was so aptly said by the chairman of the committee, only in a case of discrimination or an unfair burden. So the objections of the Senator from New York and the Senator from Connecticut were taken care of in the report of the the conferees, which is now before the Senate.

Senator Javits:

> The point I raised, in which the Senator from Connecticut was so deeply concerned, was the question of discontinuance if a net loss was shown, that being, in effect, the sole ground. As I understand, the conference report eliminates the net loss test, and the new test which is now the test provided by the bill, as to the discontinuance of any commuter service—because that was what troubled us particularly—is that it would constitute an undue burden upon the operations of such carrier or carriers, or upon interstate commerce. (104 Cong. Rec. 15529).

Contrary to the contentions of the government appellants (Brief in No. 93, pages 8, 10-30) it is thus shown that,

while Congress in enacting Section 13a(2) used, in part, the language of Section 1(18) of the Act granting a railroad authority to abandon all or a part of its lines upon issuance of a certificate from the Commission that "the present or future public convenience and necessity permit of such abondonment," it added to Section 13a(2) the further requirement that the Commission also find that the continued operation of the train sought to be discontinued "will constitute an unjust and undue burden upon the interstate operations of such carrier . . . or upon interstate commerce."

It is conceded that the Commission since the passage of the Transportation Act of 1920 has had the power to authorize the abandonment of a line of railroad operated "wholly within the boundaries of a single state," *Colorado* v. *United States*, 271 U.S. 153 (1926). But such authority is direct and without rentention of primary jurisdiction by the states, and the grant of appellate jurisdiction with the Commission. Authority to permit abandonments, which may be exercised by the Commission without the necessity of a hearing, may be more reasonably likened to the authority granted the Commission under Section 13a(1) applicable to discontinuance of interstate trains, as to which, also, no hearing is required. *State of New Jersey* v. *United States*, 168 F. Supp. 324 (D.C.N.J. 1958) affirmed per curiam 359 U.S. 27 (1959). It was the manifest intention of Congress to leave regulation of local operations to the States. *New Jersey* v. *New York, S. & W. R. Co., supra.* It is clear, therefore, the extension of appellate jurisdiction by petition to, and hearing by, the Commission as set forth in Section 13a(2), as found by the District Court (R. 642-3), and as explained (hereinbefore) by Senator Bricker is comparable to that which the Commission was earlier granted under Sections 13(3) and 13(4) (104 Cong. Rec. 15529).

Evidence and Findings in the Light of Statutory Standards

The opinion of the District Court (R. 647-657) details the substantial evidence of record which the Commission was required to consider, make findings with respect thereto, and upon which its conclusions were to be based. In summary, the District Court found evidence: for the need of the service by the general public, industry, hospitals, Duke University, and the U. S. Army; that the trains (the two involved constituting the last operating between the points involved) served an area growing in population and industry; and that passenger use within the last two and a half years had increased. The Commission's conclusion with respect to the need for the service as thus set forth was:

> However, despite the increase in patronage during the first 5 months of 1961, passenger revenues during that period amounted to only $10,650 or approximately $26,000 less than train and engine crew wages (R. 16).[3]

The evidence of record also showed: that the carrier's annual out-of-pocket savings resulting from the discontinuance of the two trains would exceed $90,000; a net freight operating profit of $630,000 in 1960 over the same trackage; that the Southern Railway System made an over-all profit of $30,702,542 in 1960, and in 1959, $33,126,744 after payment of all taxes and all operating expenses; and that its accumulated surplus in 1960 exceeded $343.5 million.

Ruling on contentions that consideration should be given to the over-all profitability of the trackage involved, and that the deficits from passenger operations should be

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[3] With respect to the same evidence the Examiner found (and his findings were adopted by the Commission) "it is obvious that the needs of these few would be insufficient to justify the institution of a new service. Conversely, it should be equally apparent that under the interests of public convenience and necessity, their needs no longer justify the continuance of existing service (R. 40).

measured against it and the over-all prosperity of the carrier, the Commission held that Section 13a(2) empowers it to authorize the discontinuance of a train upon finding that the financial results of its operations considered alone constitute an unjust and undue burden upon the interstate operations of a carrier or upon interstate commerce, adding that the legislative history of 13a(2) indicates that its purpose is to permit the discontinuance of the operation of services that "no longer pay their way and for which there is no longer any public need to justify the heavy financial losses involved." (R. 14.)

In substance the Commission held that the mere "net loss" resulting from operation of the two trains justified their discontinuance—a criterion which, as shown above, was specifically rejected by the Congress in enacting Section 13a(2).

The parity between Sections 13a(2) (even without resort to its legislative history) and 13(3) and 13(4) is clearly shown by comparison of their provisions. As this Court said with respect to the power of the Commission under Section 13(4) to alter intrastate rates, "A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders must meet 'a high standard of certainty,'" that the mere existence of a difference in the level of intrastate rates versus interstate rates does not justify Commission interference, and that the Commission "is without authority to supplant a state-prescribed intrastate rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission." *North Carolina* v. *United States*, 325 U.S. 507, 511 (1945).

Justification of an incursion of this nature upon the traditional rights of a State must clearly appear, *Chicago M. St. P. & P. R. Co.* v. *United States*, 355 U.S. 300 (1958). This Court there said:

> The basis objective of § 13(4) . . . is to prevent a discrimination against the carrier's interstate traffic which would result from saddling that traffic with an undue burden of providing intrastate services. A fair picture of the intrastate operation . . . is not shown . . . by limited consideration to the particular commuter service in disregard of revenue contributed by the other intrastate services.

Clearly those members of Congress concerned with the effect of the legislation on local operations—commuter service and the like—understood that Section 13a(2) as it was enacted would require the Commission to consider all operations of the carrier and their financial results in passing on the question of undue burden. As Senator Javits said:

> As I construe that provision the Commission would have to look at the overall situation of the entire railroad in order to determine the inequity of requiring it to continue a particular commuter branch.

Senator Bricker replied:

> The question involves the relation between the commuter income and income from the other services which the railroad renders. (104 Cong. Rec. 15529.)

The District Court held that it was error for the Commission to conclude there was an undue burden on interstate commerce or the interstate operations of the Southern without taking into consideration the total financial results of operation of the trackage involved, and the over-all prosperity of the Southern (R. 640). It was its view that whereas no single element of the evidence was in itself conclusive of the issues, the controversy could not reasonably be resolved without the Commission looking at the whole picture—particularly where competent evidence thereon was before the Commission (R. 643).

> Whether the operation of the passenger service is a burden on interstate commerce and whether there is

any longer a public need sufficient to justify the financial losses involved are questions not susceptible of scientific measurement or exact formulae but are questions of degree and involve the balancing of conflicting interests. All material factors bearing on the questions must be taken into account, the I.C.C. must consider a fair picture. *Colorado* v. *United States, supra,* pp. 168-9.

There was warrant, therefore, for the District Court to conclude that the failure of the Commission to consider substantial evidence of record required by the administrative standards of Section 13a(2) substantially prejudiced its ultimate conclusion.

CONCLUSION

It is respectfully submitted that the Court should affirm the judgment of the District Court.

Respectfully submitted,

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